In The

SUPREME COURT OF THE UNITED STATES

January Term 1976

NO. 75-1147

GLAZERS WHOLESALE DRUG CO., INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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The Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case on November 28, 1975.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 28, 1975 ("A" pp. 18- 19). The Petition for Rehearing was was denied December 31, 1975 ("A" pp.19-20). The Petition for Certiorari is filed within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

OPINION BELOW

Two cases from the National Labor Relations Board were consolidated for hearing in the Court of Appeals. Case No. 23-CA-4800 involved the discharge of Nathan A. Wilson, and the other alleged unfair labor practices occurring prior to a Union election held April 5, 1973, certified by the Board April 13, 1973. The Decision and Order of the Board is dated April 8, 1974 ("A" pp. 20-26). The Deci- and Order of the Administrative Judge is

set out ("A" pp. 26-70). Case No. 23-CA-4934 was a refusal to bargain complaint occurring more than eight months after the election. The Board Decision and Order is dated June 25, 1974 ("A" pp. 70-76). The Decision and Order of the Administrative Law Judge is set out ("A" 77-94). In each case the Board affirmed the Administrative Law Judge, except that in Case No. 23-CA-4934 the Board ordered Petitioner to pay the difference in wages paid replacements and strikers which the Administrative Law Judge had not ordered. The Board filed petition for enforcement in both cases, and the Court of Appeals entered its judgment of enforcement without opinion on November 28, 1975 ("A" pp. 18-19). The petition for rehearing timely filed was overruled December 31, 1975 ("A" pp. 19-20).

QUESTIONS PRESENTED

1. Under the facts and circumstances, Petitioner, having bargained in good faith, it was not required to bargain further.

2. Petitioner had the right, without consultation with the Union, to hire and pay replacements whatever was required to continue the business of Petitioner.

3. The Board was without authority to order Petitioner to pay strikers the difference between what was paid replacements and what strikers were paid prior to the strike.

4. The General Counsel failed to sustain his burden of proof that Wilson was discharged for his Union actividies.

NOTE

Unless otherwise specified in this Petition, the following references will be used: Petitioner refers to Glazers Wholesale Drug Co., Inc. Respondent or

Board refers to National Labor Relations Board. N.L.R.A. refers to National Labor Relations Act, as amended. Union refers to Retail Clerks Union, Local No. 455, Chartered by the Retail Clerks International Association, AFL-CIO. "A" refers to Appendix.

STATEMENT OF THE CASE

There is no relevancy between Board Case No. 23-CA-4800 and No. 23-CA-4934. No. 23-CA-4800 was a complaint charging unfair labor practices and discharge of Wilson prior to an election held in April, 1973. No. 23-CA-4934 was a complaint charging refusal to bargain after such bargaining had taken place for eight months after the election. It is undisputed that Petitioner bargained in good faith. No reference is made in No. 23-CA-4934 to No. 23-CA-4800.

In No. 23-CA-4800, the Board held

Wilson was discharged for Union activities although it was conceded that a company rule required employees to call in when they were to be absent. Wilson had failed to call in and was repeatedly warned he would be discharged if he continued to do so.

In Case No. 23-CA-4934, the Petitioner bargained in good faith with the Union in numerous meetings over a period of eight months. An impasse was reached, and twelve of the employees were called out by the Union to strike. The strike continued from October 25, 1973, to November 26, 1973, when the Union and the strikers gave up the strike. Ten of the strikers, being all who wished reemployment, requested reinstatement upon the same terms and conditions as at the date of the strike. They were reinstated by Petitioner. After their reinstatement,

there were nineteen employees in the appropriate unit. On the 30th day of November, 1973, seven of the ten former strikers filed a written petition with the Petitioner stating they no longer wished the Union to represent them. In view of such petition, which was not acted upon, the Petitioner, in order to determine the wishes of its employees, held a private election in strict accordance with Struksnes Construction Company, Inc. v. International Union of Operating Engineers, 165 N.L.R.B. 102. Of the nineteen employees, thirteen voted against the Union, three voted for the Union, and three abstained from voting because they were in the Armed Services of the United States. After the result was ascertained, the Petitioner refused to bargain with the Union on or about December 4, 1973. The Court of Appeals, the Board and the

Administrative Law Judge did not challenge the election held by the Petitioner. They took the position that such election occurred within a 12-month period, and that Petitioner must bargain for twelve months. The time for bargaining was extended by the Board for four months.

In order to continue the business of Petitioner, it had to have replacements during the strike. Although it kept within the range of $1.76 to $2.00 per hour, it paid some replacements $1.85 per hour. The Board (not the Administrative Law Judge) ordered the Petitioner to pay strikers the difference in wages paid replacements during the strike and decided that Petitioner should have consulted the Union. The Court of Appeals ordered the enforcement of the Board's Orders, thereby approving the Board's Decisions and Orders.

REASONS FOR GRANTING WRIT

1. There are conflicts between the decision of the Court of Appeals enforcing the order of the Board and other Courts of Appeal, and the Court of Appeals and the Board have misinterpreted the decision of the Supreme Court in Brooks v. N.L.R.B., 348 U.S. 96. In N.L.R.B. v. Alva Allen Industries, 369 F.2d 310, the Court of Appeals for the Eighth Circuit states that the exceptions contained in Brooks v. N.L.R.B. are not exclusive. The one year rule is not a rule, but a doctrine of convenience. In N.L.R.B. v. Crystal Laundry and Dry Cleaning Co. (6th Circuit), 308 F.2d 626, the Court states that there is no allegation or evidence that the poll "was coercively conducted" and Petitioner was, therefore, justified in refusing to bargain after such election. The

rule of good faith doubt has been abandoned (N.L.R.B. v. Gissel Packing Co., 395 U.S. 567, and Bartenders International Union, 213 NLRB 74). The new rules are the basic rules for withdrawal of recognition from an established bargaining representative and are these: Once a Union has been certified as bargaining representative, there is a rebuttable presumption that the Union's majority status continues. The employer may rebut the presumption of majority status by establishing that at the time the employer refused to bargain the Union in fact no longer represented a majority; an assertion must be grounded on objective considerations. The "serious doubt" really means a claim of loss of majority on "objective considerations." Wanda Petroleum, 217 NLRB 62. In this case, these "objective considerations" have

been conclusively met. Here, we have undisputed good faith bargaining for eight months; undisputed facts of a strike which the Union lost; undisputed facts that ten strikers returned; undisputed facts that they petitioned to rid themselves of the Union; undisputed facts that Petitioner, in order to determine whether its employees wanted the Union to represent them further, conducted an uncoercive election as set out in Struksnes Construction Company, 165 NLRB 102; undisputed facts that thirteen of the nineteen employees voted against the Union, three for it, and three abstained. The Gissel case and the cases above set out modified the rule in Brooks v. N.L.R.B. The fixing of a 12-month period for bargaining under the facts of this case is arbitrary and capricious.

2. The enforcement by the Court of

Appeals of the order of the Board that Petitioner must bargain with the Union as to replacement of strikers and the wages paid to replacements is in conflict with Pacific Gamble Robinson Company v. N.L.R.B. (6th Circuit), 186 F.2d 109, and the Supreme Court in NLRB v. Columbian Emanuel & Stamping Co., 306 U.S. 292. The Pacific Gamble Robinson case states that "when the replacements are legally hired during the course of a strike, the employer need not negotiate with the Union the conditions under which new employees are to be hired to replace the strikers" and continued, "so to hold would be to nullify the Respondent's right to hire replacements. See also N.L.R.B. v. Mackay Radio & Telegraph Company, 304 U.S. 333, by the Supreme Court, in which it is said "Nor was it an unfair labor practice to replace the striking remployees with others in an

effort to carry on the business." The record shows only six replacement employees were hired, and it is undisputed that wages paid were within the range of wages paid the strikers. There is no dispute the strike was an economic strike. The Administrative Law Judge did not hold, as the Board did, that strikers were due the difference in wages paid replacements. In N.L.R.B. v. Great Dane Trailers, 388 U.S. 26, the Court says on page 1035:

> "On the other hand, when 'the resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful,' and an affirmative showing of improper motivation must be made.
>
> "From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board

> can find an unfair labor practice even if the employer introduced evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."

3. The decision of the Board, approved by the Court of Appeals, that strikers should receive the difference in wages paid replacements is contrary to the decision of the Ninth Circuit in Cullinary Alliance & Bartenders Union v. N.L.R.B., 488 F.2d 644. In this case, it quotes the Board as saying that it is unconvinced that it has the statutory authority to grant a make whole remedy for loss of collective bargaining benefit. Moreover, although so determined in Tidee Products, 426 F.2d 1243, by the District of Columbia Circuit, no other circuit has

endorsed such position. In the Tidee case, it was held there must be a "clear and flagrant violation of the law." In our case, there is no such evidence of a clear and flagrant violation of the law. It is earnestly submitted that the decision of the Board is clearly erroneous according to its own statements in the Cullinary Alliance case. The same is true of the extension of bargaining for four months.

4. The General Counsel had the burden of proving Wilson was discharged for Union Activities. The decision of the Board and the enforcement thereof by the Court of Appeals is in conflict with its own and other decisions. N.L.R.B. v. Long Island Airport Limousine Service (5th Circuit), 468 F.2d 292; N.L.R.B. v. Ogle Protection Service (5th Circuit), 375 F.2d 497; Holcomes Armature

v. N.L.R.B., (5th Circuit), 325 F.2d 506; and N.L.R.B. v. Great Dane Trailers, 388 U.S. 26. The burden is on the General Counsel. It was conceded by the Administrative Law Judge that the Company rule required employees to call in when absent. Wilson's payroll records show absences from thirteen to fifteen times during the 6-month period preceding the election, and Wilson was repeatedly warned. Petitioner conclusively proved Wilson was discharged for failing to call in. Others had been fired for the same reason. The Administrative Law Judge relied on circumstantial evidence. His inference from the record as a whole was not reasonable. There was no rational connection between the facts proved and the facts inferred. N.L.R.B. v. Long Island Airport Limousine Service. The Petitioner fully met its obligation

to prove Wilson was not discharged for Union activities. The decision is wrong. See also quotations from Great Dane Trailers on pages 13 and 14 of this petition.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

EMIL CORENBLETH
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)
)
Petitioner,)
)
v.)No.74-3682
)
GLAZERS WHOLESALE DRUG COMPANY,)
INC.,)
)
Respondent.)

JUDGMENT

Before: GODBOLD, DYER and MORGAN,
Circuit Judges

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Glazers Wholesale Drug Company, Inc., San Antonio, Texas, its officers, agents, successors, and assigns on April 8, 1974. The Court heard argument of respective counsel on November 5, 1975, and has considered the briefs and transcript of record filed in this cause. On November 6, 1975, the Court granting enforcement of the Board's order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said

proceeding be enforced, and that the Respondent, Glazers Wholesale Drug Company, Inc., San Antonio, Texas, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: NOV 28 1975

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 74-3682

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

GLAZERS WHOLESALE DRUG COMPANY, INC.,

Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING

(DECEMBER 31, 1975)

Before GODBOLD, DYER and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and

numbered cause be and the same is hereby denied.

MFP

209 NLRB No. 175

D--8523
San Antonio, Tex.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GLAZERS WHOLESALE DRUG COMPANY, INC.

and Case 23--CA--4800

RETAIL CLERKS UNION, LOCAL NO. 455, CHARTERED BY THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL--CIO

DECISION AND ORDER

On December 13, 1973, Administrative Law Judge Morton D. Friedman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act,

as amended, the National Labc : Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided[1/] to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order with the following modification:

Although we otherwise agree with the findings of the Administrative Law Judge, we would not premise an 8(a)(1) finding on Villareal's remark to employee Canales to

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1/ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

the effect that if the Union was voted in, "the blacks would take over," and that the Union would then "run out the Chicanos and hire nothing but blacks." The complaint alleged, and the Administrative Law Judge found, this conduct to be a violation on the premise that Villareal's statement was a threat that the "union would engage in racial discrimination if the employees selected it as their bargaining representative." Although such a remark may well be grounds for setting an election aside under the standards established for campaign statements referring to racial issues in Sewell Manufacturing Company, 138 NLRB 66, it is not, as our dissenting colleague suggests, a threat of employer action, and does not, therefore, establish a violation of Section 8(a)(1).

ORDER

Pursuant to Section 10(c) of the

National Labor Relations Act,as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent, Glazers Wholesale Drug Company, Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order with the following modifications:

1. Delete the phrase"threatening employees that the Union would engage in racial discrimination if the employees select the Union as their collective bargaining representative" from paragraph 1(a).

2. Substitute the attached notice for the Administrative Law Judge's notice.

Dated, Washington, D.C. APR 8 1974

Edward B. Miller, Chairman

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Member Fanning, dissenting in part:

I cannot agree with my colleagues that the Administrative Law Judge's finding with respect to Manager Villareal's remark to Canales and Jimenez constituted merely a threat that the Union would engage in racial discrimination if it won the election. Clearly, he held that Manager Villareal had threatened the employees' job security and thereby interfered with their rights under Section 8(a)(1), citing Certain-Teed Products Corporation, 153 NLRB 495, 507. There the Board held that Foreman Schriver's "statement to Stoker and Vance Kellum,

white employees, that a Negro might replace them if the Union won the election, was a threat to their job security." Manager Villareal had said, We Chicanos should stick together because the blacks were trying to get us to vote in the Union and after we voted the Union in blacks would take over, and, you know, would run out the Chicanos and hire nothing but blacks." The Chicanos to whom Manager Villareal addressed his remarks knew that the Employer, not the Union, hired employees. Obviously, Manager Villareal was suggesting to them that their Employer would cooperate with the blacks and hire nothing but blacks, if the Chicanos dared to vote with the blacks for the Union. In my opinion, this is the vilest type of antiunion propaganda before an election, pitting two minority groups against each other

and insinuating to one that the Employer would help the other establish racial discriminatory hiring practices. I would find this conduct to constitute a violation of Section 8(a)(1) as did the Administrative Law Judge.

Dated, Washington, D.C. APR 8 1974

John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

JD-753-73
San Antonio, Tex.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS ROARD
DIVISION OF JUDGES
WASHINGTON, D. C.

GLAZERS WHOLESALE DRUG COMPANY, INC.

and Case 23-CA-4800

RETAIL CLERKS UNION, LOCAL NO. 455, chartered by the RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Dwain Irwin, Esq. and
Jorge Torres, Esq., of Houston,

Tex., for the General Counsel.
Emil Corenbleth, Esq.,of Dallas,
Tex., for the Respondent.
Aurbin Dickey,of Houston, Tex.,
for the Charging Party.

DECISION

Statement of the Case

MORTON D. FRIEDMAN, Administrative Law Judge: Upon a charge filed on May 31, 1973 and an amended charge filed on August 6, 1973, by Retail Clerks Union, Local No. 455, chartered by the Retail Clerks International Association, AFL-CIO, herein called the Union or the Charging Party, the Regional Director for Region 23 of the National Labor Relations Board, herein called the Board, issued a complaint on August 24, 1973, on behalf of the General Counsel of the Board against Glazers Wholesale Drug Company, Inc., herein called Glazers or the Respondent, alleging violations of Sections 8(a)(3) and (1) of the National Labor Relations Act, herein called the Act. In its duly filed answer, the Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practices.

Pursuant to notice, a hearing in this case was held before me at San Antonio, Texas, on October 10 and 11, 1973. All parties were represented and were afforded full opportunity to be heard, 1/ to introduce relevant evidence,

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1/ At the hearing, and again in its brief, the Respondent moved that all

to present oral argument and to file briefs. Oral argument was waived. Briefs were filed by counsel for the General Counsel and the Respondent. Upon consideration of the entire record herein, and upon my observation of each witness appearing before me, I make the following:

1/ (Continued) allegations of unfair labor practices occurring prior to February 24, 1973, should be dismissed inasmuch as the complaint did not issue until August 24, 1973, and neither of the charges set out specific allegations of Section 8(a)(1) of the Act. The Respondent's motion was denied at the hearing and that ruling is hereby affirmed. Even assuming that some of the allegations of violation of Section 8(a)(1) of the Act occurred during February but prior to February 24, the 6-month limitation set forth in Section 10(b) of the Act refers only to the charge and not to the complaint. Since the original charge in this proceeding was filed on May 31, 1973, there are no allegations in the complaint of violations of the Act occurring more than 6 months before that date and, therefore, the principle of Bryan Mfg. Co. v. N.L.R.B., 362 U.S. 411, cited by the Respondent, is not apposite here. Additionally, the Respondent argues that since these matters were not specifically alleged in the charge, they cannot now be heard as alleged in the complaint issued more than 6 months after the alleged events. (Continued)

Findings of Fact

I. The Business of the Respondent

The Respondent, a Texas corporation, maintains an office and place of business

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1/ (Continued) However, the Supreme Court has held in N.L.R.B. v. Fant Milling Co., 360 U.S. 301, that "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion machinery of an inquiry. N.L.R.B. v. I. & N. Electric Co., 318 U.S. 9, 18. The responsibility of making that inquiry and of framing the issues in the case is one that Congress has imposed upon the Board, not the Charging Party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purposes of the Act. . . . Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge." In the instant case, both the charge filed on May 31 and the amended charge filed August 6, although specifically (Continued)

in San Antonio, Texas, where it is engaged in the wholesale liquor business. During the 12-month period, immediately preceding the issuance of the complaint herein, a representative period, the Respondent purchased goods and materials of a value in excess of $50,000 which were shipped directly to Respondent's facility from points outside the State of Texas. It is admitted, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

1/ (Continued) alleging only discriminatory discharges of employees, also contain the following statement "By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act." Thus, the 8(a)(1) allegations of the complaint even though not alleged specifically in the charge, were related to the charges and grew out of the investigation of the Board with regard to the charges filed. Accordingly they are properly before the Board in this proceeding and relate to alleged incidents occurring within the 6-month period set forth in Section 10(b) of the Act.

III. The Unfair Labor Practices

A. Background and Issues

Sometime early in February, 2/ the Union began an organizational campaign among the warehouse employees and truckdrivers at the Respondent's San Antonio facility, the only facility of the Respondent with which the proceeding is concerned. On February 15, the Union sent a telegram to the Respondent evidently demanding recognition and bargaining. Thereafter, in April a Board-conducted election, which the Union won by unanimous vote gave the Union the right to represent the Respondent's employees, in the unit above described, as the certified bargaining representative. At the time of the hearing herein, the Union and the Employer were bargaining toward a contract.

According to the complaint, during the period from about the middle of February until as late as July 16, 1973, the Respondent, through its warehouse manager, Louis Villareal, interfered with, coerced and restrained various employees in violation of Section 8(a)(1) of the Act by interrogating employees with regard to other employees' union activities, soliciting employees to conduct surveillance of other employees' union activities, threatening employees that the Union would engage in racial discrimination if selected, making promises

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2/ All dates herein are in 1973 unless otherwise specified.

of benefits in order to induce the employees to give up their union activities, soliciting an employee to falsely accuse the Union of threats of violence and threatening an employee with loss of his vacation if he gave assistance or support to the Union.

Additionally, the complaint alleges that Villarreal discharged employee Nathan A. Wilson, an active union adherent, and Roger E. Gonzalez, another employee, because of their membership in and activities on behalf of the Union and that such discharges were undertaken in order to discourage union and other concerted activities.

The Respondent's answer, as noted above, denies the commission of any unfair labor practices, Respondent contending that Villarreal engaged in none of this activity in violation of Section 8(a)(1); that Villarreal did discharge Wilson, but for good cause and not for any discriminatory purpose and that Roger Gonzalez, a temporary employee who worked only a small part of a week, failed to report for work but was never discharged.

B. Interference, Coercion and Restraint

1. The actions of Louis Villarreal

As noted above, the Union's campaign among the Respondent's warehouse employees and truckdrivers began in February. During that month, probably toward the end of the month, Gilbert M. Canales, Jr., a warehouseman, was approached by warehouse manager Louis Villarreal in the bottle room. Villarreal asked Canales if

the latter knew who was involved in the union activities in the warehouse. Upon Canales' reply that he did not know, Villarreal pressed Canales and asked the latter if Nathan Wilson was engaged in such activity. Canales again answered that he did not know. Villarreal then told Canales that he was pretty sure that the blacks were involved in the union activity. Villarreal added that he did not want anybody talking about unions in the warehouse and that if anybody did talk about unions in the warehouse, presumably during working time, Villarreal would fire such individuals. Villarreal also added that there was no way that the Union was going to come into the warehouse. The conversation ended with Villarreal asking Canales if the latter heard anything with regard to union activity to inform Villarreal about the matter. Canales answered that he did not wish to get involved.

Again, in the month of March, Villarreal engaged Canales in another conversation concerning union activity in the warehouse. Villarreal asked Canales and Jimmy Jimenez, who was also present, if the latter two knew anything about the union activity that was going on in the warehouse. They both answered in the negative. Then Villarreal told Canales and Jimenez "We Chicanos should stick together because the blacks were trying to get us to vote in the Union and after we voted the Union in the blacks would take over, and, you know, would run out the Chicanos and hire nothing but blacks."3/

3/ All of the foregoing from (Continued)

During approximately the last week of March, employee Margarito Jimenez, called Jimmy by his fellow employees, was engaged in a conversation with Villarreal

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3/ (Continued) the credited testimony of Canales. Villarreal denied that he ever spoke to any of the employees with regard to the Union or union activity except to tell the employees that they could not discuss the Union on company time. He also ascribed the conversation with regard to the blacks to the statements of a black driver who had come in from Respondent's Houston, Texas, facility. However, he also ascribed the words repeated above to Canales himself rather than to Villarreal. Although Villarreal testified emphatically upon direct examination that he knew nothing about the union activity until some time in March, upon being pressed on cross-examination, Villarreal admitted that he received a list from the Respondent's counsel, informing him what he could or could not do, some time in February and then finally admitted that the Respondent's facility manager, James Christie, might have discussed the matter with him in February shortly after February 15 when Christie received the demand telegram from the Union. Because of these inconsistencies in Vallarreal's testimony, and for other reasons which are set forth below in this decision, and from my observation of Villarreal on the witness stand, I do not credit Villarreal in many instances in which his testimony conflicts with the testimony of other witnesses.

near the latter's office. Villarreal asked who was behind the union activity and who started the Union. Jimenez answered that he did not know. Villarreal then asked if Wilson (Nathan Wilson) or Homer (Homer Adams) were the principal employees engaged in bringing the Union into the Respondent's facility. Villarreal also asked Jimenez if the latter would try to find out who was behind the union movement. Villarreal told Jimenez that he had tried his best to find out who had started the union movement.

Jimenez testified to another incident involving Villarreal. According to Jimenez, 2 or 3 days before the election took place on April 5, Villarreal offered Jimenez a job as assistant to Villarreal in the warehouse at an increase in salary. Jimenez further testified, as did Villarreal, that this job offer had initially been made to Jimenez on an earlier occasion and renewed as late as a week or two before the hearing herein. However, at this critical time in April, just 3 days before the election, Villarreal conditioned the offer upon the request that Jimenez "just drop the union and go on his side, and, take the company's side."

Although Villarreal denied emphatically that he conditioned the offer made on or about April 2 to Jimenez, upon Jimenez' repudiating the Union, for reasons heretofore stated and hereinafter stated, I do not credit Villarreal's denial but do accept the testimony of Jimenez as quoted. Accordingly, I find that on or about April 2 Villarreal

promised Jimenez the assistant's job at a wage increase if Jimenez would repudiate the Union.

Another incident involving wage rate increases occurred during the month of March before the election. At that time, in the warehouse, Villarreal engaged employee Theodoro Gonzalez and two other employees in a conversation. He told the employees that he was going to work out a raise for them, that he was going to call the other companies and distributors in the same business and find out what they were paying people doing comparable work. Villarreal told the employees that he thought it would come to about $2.25 or $2.50 an hour. He added, however, that he could not do anything at that point because of the Union. 4/

Another incident involving a promise of a pay raise by Villarreal occurred about 3 weeks before the election. On or

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4/ From the credited testimony of Gonzalez. Villarreal admitted the incident but testified that the conversation occurred as the result of an earlier request by the employees for a raise. Moreover, Villarreal testified that he added, when he told Gonzalez that he could not do anything about the raise because of the Union, that the reason was that if he gave them the raise at that time it would be an unfair labor practice. I do not accept Villarreal's version.

about March 20, employee Joe Correa, a truckdriver, had returned from a delivery when Villarreal called to him and asked "Joe, did you went to the meeting last night?" Correa answered that he did not because he lived too far away and that, moreover, he never went to meetings. Then Villarreal stated, "Well, that's good, Joe. You've been a good worker. You like working here?" When Correa answered in the affirmative, Villarreal stated to him "Well, if you stay out of the union I probably will give you $2.50 an hour and I will give you some good work and some of the other guys that I know." That ended the conversation.

Upon the date of the election, April 5, Villarreal, at about 7 a.m., stopped Correa as the latter was entering the warehouse to vote in the election. Villarreal stated that he wanted Correa to help him out. When Correa asked Villarreal what the latter wanted Correa to do, Villarreal told him, "Well, just say any old shit about the union, that they were trying to threaten you or trying to beat you up for not joining the Union." When Correa stated that he would not do that, Villarreal said "Well, are you going to vote for the Union?" And Correa answered that he did not know, that he probably would vote "no." However, Correa voted "yes." 5/

Apparently, the work in the warehouse went along without any untoward

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5/ All of the foregoing from the credited testimony of Correa. Upon (Continued)

incidents until some time in July when the Respondent and the Union were in the process of negotiating and the employees in the warehouse and the drivers were evidently talking about a possible strike. On July 10, Jimmy Jimenez in delivering merchandise to a customer in Austin, met one of the Respondent's display men who was evidently setting up a display at the customer's store. Jimenez told the display man, in what Jimenez

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5/ (Continued) cross-examination of Correa, Respondent's counsel asked Correa if the latter had been discharged by the Respondent and if so did Correa feel unkindly toward the Respondent. Correa answered in the affirmative. Respondent's counsel also asked Correa if the latter had been told he had been discharged for selling whiskey taken from the Respondent. Correa answered that he had been told that but denied that he had ever done so. Significantly, neither facility manager Christie nor warehouse manager Villarreal, in testifying after Correa testified, mentioned the reasons for Correa's discharge. Upon my observation of the witness and Correa's complete candor in saying that he did not feel kindly toward the Respondent and, also, because I have heretofore not credited Villarreal's testimony, I credit Correa and do not credit the version of these conversations given by Villarreal. Nor do I credit Villarreal's denials that certain parts of the conversation ever took place.

described as a joking manner, to make some picket signs because the employees were going out on strike. When Jimenez returned from Austin, Villarreal asked Jimenez to come to the office. Villarreal asked Jimenez what this strike talk was about. He told Jimenez that the latter had "gotten everybody in Austin all shook up." Then Villarreal told Jimenez that this could get the latter in a lot of trouble and that he could get fired for that. Jimenez explained to Villarreal that he was just joking, that he did not mean anything by the remarks to the display man. 6/

One other incident alleged as an unfair labor practice occurred in July. Employee Manuel Rocha, a warehouseman, had worked on and off for the Respondent for several years and had been discharged or had quit several times. However, he was working during the period immediately preceding the month of July and during July, 1973. Rocha felt that he should get his vacation even though he had not worked steadily for the Respondent during the period which would have made him eligible for a vacation. Rocha had asked the Respondent for vacation pay evidently on the basis that although he had not worked continuously he had put enough time in during his various periods of employment with the Respondent in order to earn his vacation pay.

6/ From the credited testimony of Jimenez. Villarreal admitted to this conversation and also testified that he told Jimenez that the latter would have to probably see (Continued)

On approximately July 16, Villarreal engaged Rocha in a conversation while Rocha was unloading a boxcar. Villarreal said that he had something nice to talk to Rocha about. Rocha answered that if it was something nice he would talk to him. Villarreal then took Rocha down to the dock and told him the latter that if Rocha wanted his vacation, to forget about the Union and that Rocha would get his 2 weeks or else he would not vouch for Rocha. Rocha told Villarreal to forget about it, that he was going to stay with the Union.7/

2. Concluding findings with regard to the alleged interference, coercion and restraint

When, in February 1973, Villarreal interrogated employee Canales as to the union activity of Nathan Wilson, such interrogation was coercive and, accordingly, was violative of Section 8(a)(1) of the Act. At the same time, when Villarreal asked Canales to inform him of the union activities with regard to any of the Respondent's employees, this was unlawful solicitation for information and

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6/ (Continued) Manager James Christie later on and that Villarreal would leave it up to Christie to decide about what to do regarding the matter.

7/ All of the foregoing from credited testimony of Rocha. I do not credit Villarreal's denial of the conditional offer made to Rocha. However, I do credit Christie, whom I found to be a most forthright witness. Christie testified about the Rocha vacation problem as hereinafter related.

constituted interference and coercion in violation of Section 8(a)(1) of the Act.

As set forth above, in March, when Villarreal asked Canales if the latter knew anything about union activity that was going on in the warehouse, Villarreal violated Section 8(a)(1) of the Act. When Villarreal combined that unlawful interrogation with the remark that the Chicanos should stick together because the blacks were trying to get the employees to vote in the union and after they voted in the union the blacks would take over, his remarks became a threat to the employees' job security if the union won the election. Such threat constituted interference with the employees' Section 7 rights and, accordingly, violated Section 8(a)(1) of the Act.8/

When, during the last week of March, Villarreal asked Jimmy Jimenez who was behind the union activity and whether Nathan Wilson or Homer Adams were the principal union adherents, he coercively interrogated Jimenez and thereby violated the latter's Section 7 rights and Section 8(a)(1) of the Act. During the same conversation Villarreal asked Jimenez if the latter would try to find out who was behind the union movement, and solicited Jimenez to act as an agent for surveillance of fellow employees' union activities. Such request constituted interference, coercion and restraint in violation of Section 8(a)(1) of the Act.

8/ See Certain-Teed Products Corporation, 153 NLRB 495, 507

Additionally, when Villarreal inquired of employee Correa on March 20 as to whether the latter attended a union meeting and at the same time orally promised Correa a $2.50 an hour raise if Correa would stay out of the union, Villarreal's activity constituted unlawful coercive interrogation and unlaw promises of benefit which interfered with Correa's Section 7 rights and the Section 7 rights of other employees. Accordingly, I find that by these actions Villarreal, and the Respondent, violated Section 8(a)(1) of the Act.

In promising Jimenez on about April 2 a manager assistant's job conditioned on Jimenez dropping the union and taking the company's side, Villarreal interfered with the employee's Section 7 rights and therein violated Section 8(a)(1) of the Act.

We come now to the incident occurring on the day of the election in which Villarreal solicited employee Correa to accuse the Union of threatening, or trying, to physically assault Correa. This activity was clearly violative of Correa's rights and the Section 7 rights of the other employees in that it tended to interfere with the employees' free selection of a bargaining representative. Therefore, this activity is violative of Section 8(a)(1) of the Act.

Although the complaint alleges that at the same conversation Villarreal told Correa not to vote unless he voted against the Union, Correa's testimony makes no mention of this incident. Correa did testify, that Villarreal asked Correa

how the latter was going to vote. However, there was nothing in Correa's testimony to indicate that Villarreal specifically attempted to dissuade Correa from voting if the latter was going to vote for the Union. Accordingly, I shall order dismissed that portion of the complaint which alleges such an incident.

Accepting the testimony of Manager James Christie to the effect that because Rocha had left Respondent's employ and had been reemployed on several different occasions, there was a question as to whether Rocha was entitled to vacation pay, and accepting further that the Respondent ultimately paid Rocha his vacation pay upon advice of counsel, nevertheless, I find and conclude that Villarreal told Rocha, in effect, that Rocha would not get his vacation pay if Rocha gave assistance to or support to the Union. I accept, further, the fact that the Respondent's official policy with regard to Rocha's vacation was one of good faith. However, in telling Rocha that Rocha's vacation depended on whether or not the latter forgot about the Union, Villarreal engaged in an activity which threatened and coerced Rocha in his union activity and sympathy. The record clearly establishes that at the time that Rocha was seeking a vacation or vacation pay, the Respondent was in the process of negotiating with the Union toward a collective bargaining agreement. It may reasonably be inferred from the facts as presented by the various witnesses, and especially by Villarreal, that at this time there was talk in the shop about a strike. Accordingly,

Villarreal was understandably concerned about this phase of union activity and it is reasonable to assume that, therefore, he would have made such a statement to Rocha in order to prevent the latter from joining any possible strike along with his fellow workers. Accordingly, I do not find merit in the Respondent's contention that the election having been over for months, and the Union having been well established and every employee of the Respondent having been a member of the Union, it was not logical for Villarreal to have made such a statement to Rocha at the time he is alleged to have done so. Therefore, I find and conclude that by Villarreal's statement to Rocha, Villarreal committed an act which constituted a violation of Section 8(a)(1) of the Act.

The same conclusion is not reached, however, with several other alleged violations of Section 8(a)(1) of the Act. Thus, when in March, Villarreal allegedly informed employees that a planned wage increase would be denied because of the union activities, Villarreal's explanation, although not completely accepted, leads to the conclusion that the withholding of the increase was not by reason of the employees' union activities or even because the Respondent wished in any way to retaliate or to influence the employees with regard to their union affiliation. The increases were not promised or planned prior to the advent of the Union, but, I accept that portion of Villarreal's testimony to the effect that before the advent of the Union, Rocha and

others had asked about a wage increase. By reason of this request, Villarreal began making inquiries among the Respondent's competitors to find out, if possible, what competitor's employees performing similar work were receiving by way of emolument. While I accept Rocha's testimony to the effect that Villarreal did not mention anything about holding back on any increase because the Respondent sought to avoid committing an unfair labor practice, I find that from Rocha's testimony, Villarreal did not condition the giving of the wage increase upon the employees' withdrawal of support for the union or abstinence from union activity. He merely informed the employees that the increase could not be given at that time because of the advent of the Union. Although he may not have done so with sufficient clarity to satisfy the employees, nevertheless what Villarreal was trying to tell the employees was that the Respondent did not wish to be accused of a violation of the Act by giving them a wage increase during the height of the preelection campaigning. This was not an instance of an employer threatening to withhold a regularly scheduled wage increase because of the advent of the Union or even a promised wage increase in order to retaliate against the employees for their union activities. Rather, I find and conclude, that the statement By Villarreal to Gonzalez was no more and no less than a statement of what Villarreal considered to be the law. Accordingly, I do not find that this statement was coercive or that it restrained or interfered with the employees' Section 7 rights. Therefore, I shall

order the section of the complaint alleging the violation to be dismissed.

The same conclusion is reached with regard to the alleged violation of Villarreal's threat of disciplinary action against Jimenez after the latter had discussed with the Respondent's display man in Austin the possibility of a strike. As noted above, Jimenez had asked the display man, although in a joking manner, to prepare strike signs. While it is true that Villarreal was concerned at that time about the possibility of the warehouse employees and the truckdrivers going out on strike, it is equally true that Jimenez requested the sign be made by the display man at a time when both Jimenez and the display man were engaged in work time for the Respondent. Moreover, it is equally true that such a statement to the display man in a customer's store could very well have been an unwarranted interference with the Respondent's business. Accordingly, under these circumstances, even though Villarreal might not have accepted Jimenez' explanation that the remark of Jimenez to the display man was made in jest, Villarreal under all the circumstances, was warranted in implying to Jimenez that there was a possibility that the latter would be disciplined for talking about the strike while engaged in conducting business for the Respondent. Accordingly, I shall also dismiss the allegation of the complaint alleging that this incident constituteda violation of Section 8(a)(1) of the Act.

The complaint also alleged that on or about July 12, Villarreal orally

threatened employees with discharge if they engaged in union activity. The record is devoid of any proof with regard to this allegation and I shall therefore order it to be dismissed.

C. The Alleged Unlawful Discharge of Roger E. Gonzalez

The only testimony presented by the General Counsel with regard to the allegedly discharge of Roger Gonzalez was that of Jimmy Jimenez who testified that on July 12 he had a conversation with Villarreal in which he asked Villarreal what had happened to an employee named "Roger." Jimenez did not know Roger's last name and Roger, according to Jimenez, had only been in the Respondent's employ a few days. Villarreal, according to Jimenez, answered that he, Villarreal, had let Gonzalez go because the latter could not make up his mind whether to go with the Union or against the Union.

According to Villarreal, he had not discharged Gonzalez at all. Gonzalez had been taken on as a temporary employee, had worked for the first day on a Friday as such temporary employee for 5 1/4 hours. Gonzalez was off Saturday and Sunday and came to work on Monday and worked 10 1/2 hours. Then he did not report to work on Tuesday morning when he was supposed to and finally arrived at 12:55 p.m. However, before that Villarreal called Roger Gonzalez, spoke to his wife and she said that Gonzalez had had car trouble. The next day Gonzalez did not show up for work and never reported after that. Villarreal, therefore, did not discharge him. Villarreal admitted that he had

asked Roger Gonzalez if the latter would back him up and help him continue with the work in the event that the men went on strike. Gonzalez told Villarreal that he would think it over. But Gonzalez never informed him because Gonzalez never returned to work. With regard to Jimenez' claim that Villarreal told Jimenez that Gonzalez could not make up his mind to choose between the Union and the Company, Villarreal testified that what he said was only that Gonzalez could not make up his mind.

I find and conclude that Villarreal's version of what occurred both with regard to the manner in which Roger Gonzalez left the Respondent's employ and the content of his conversation with Jimenez is the more reliable of the two versions. This is so because Gonzalez was only a temporary employee, and at that, very unreliable. Respondent's records introduced into evidence at the hearing bolster this conclusion. Additionally, Gonzalez failed and refused to attend the hearing herein and testify on behalf of the General Counsel. While it is possible that an unlawful dischargee may refuse to testify on behalf of the General Counsel for reasons known only to himself, it is very unusual that such refusal is made. Accordingly, I conclude that the reason Gonzalez did not appear at the hearing to testify was because, in fact, he was not discharged but left the Respondent's employ voluntarily. I further conclude that Jimenez' testimony, although not purposely misleading, nevertheless represented Jimenez' interpretation of a conversation, the implications of which he did not fully understand. Thus, I find that Jimenez'

testimony in this regard constitutes too thin a threat upon which to base a finding of discriminatory discharge. I conclude, therefore, that the General Counsel has failed to establish by a preponderance of the credible evidence that Roger Gonzalez was unlawfully discharged by the Respondent. Accordingly, I shall order that allegation of the complaint alleging such discharge to be dismissed. 9/

D. The Discharge of Nathan A. Wilson

Wilson was employed as a warehouseman by the Respondent on August 11, 1972. In early February 1973, at the time the Union began its organizational campaign among the Respondent's warehouse employees, Wilson became a union activist. Thus, during the organizational period Wilson talked to other employees on occasions before work and after work about the Union. He spoke, concerning the Union, to every man in the unit at one time or another. He also obtained five or six signed cards

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9/ In crediting Villarreal's version of the quitting of Roger Gonzalez and the conversation with regard thereto with Jimmy Jimenez, I am aware that in other instances I have refused to credit Villarreal's testimony. To the extent that I credit a witness only in part, I do so upon the evidentiary rule that it is not uncommon "to believe some and not all of a witness' testimony." N.L.R.B. v. Universal Camera Corp., 179 F.2d 749, 754 (C.A. 2).

and returned them to the union representative. The extent of Wilson's activities on behalf of the Union can better be understood in view of the fact that he obtained five or six signed cards out of a total of 14 employees in the unit.

On March 27, Wilson was, according to Wilson, ill and could not report to work. According to both Wilson and Wilson's wife, Etta, Wilson had his wife call the Respondent's plant at 6:30 a.m. on that day to inform Villarreal that Wilson would be unable to attend work that day because of the illness. According to Mrs. Wilson, she called on a telephone from a neighbor's house, because Wilson does not have a telephone, and spoke to a lady who told her that she would inform Villarreal that Nathan Wilson would be absent. As hereinafter related, the Respondent contends, through several witnesses, that no such call was ever received by the Respondent and Villarreal was not informed that Wilson would be absent on March 27. In any event, when Wilson reported to work at his normal working time on March 28, Villarreal told Wilson that the Respondent did not need Wilson any more. Wilson left the Respondent's premises, went to the union hall where he was instructed to obtain a written reason for his discharge.

Later that day Wilson returned to the Respondent's premises and spoke to the San Antonio facility manager, James Christie. It was evident that Christie did not know that Wilson had been discharged. According to Christie, whom I fully credit in every respect, Wilson told Christie that he had been absent the day

before and had not called in. Christie then informed Wilson, according to Christie, that they had a more or less unwritten rule that when an employee was to be absent or late he was to call in and inform Villarreal or whoever was in charge about the absence or lateness. Thereupon Christie called Villarreal, who told Christie that this was not the first time that he had had difficulties in this respect with Wilson. Christie asked Villarreal whether Wilson was a good worker and Villarreal replied that he was a good worker when he was present. Christie told Villarreal that this was Villarreal's decision and that he would back him up. Whereupon Christie instructed Villarreal to draft a written reason as to why Villarreal discharged Wilson. This statement was given to Wilson. When Christie gave Wilson the written statement which contained the information that Wilson had been warned three or four times on earlier occasions about his being late or absent without calling in, Christie said that he was very sorry that the thing had happened and if Wilson needed any assistance in the future he would write him a letter and would be glad to do anything and to help Wilson in any way he could. However, he did not reinstate Wilson.

The General Counsel would seem to contend that firstly there was no rule in the Respondent's establishment that an employee who was going to be absent had to call in and inform the Respondent's officials. Secondly, General Counsel contends that in the case of Wilson, he did call in on the day he was absent and that Villarreal was informed that Wilson was going to be absent. Thirdly, General

Counsel contends that, if any event, whether Wilson's wife called in or not, the Respondent through Villarreal seized upon Wilson's absence as a pretextual excuse for discharging Wilson when, in fact, Villarreal discharged Wilson for the discriminatory reason that Wilson was most active in bringing the union into the Respondent's facility.

On the other hand, the Respondent contends that the General Counsel has failed to establish by a preponderance of the credible and substantial evidence that the discharge of Wilson was motivated by anti-union considerations; that the General Counsel has failed to prove the Respondent had knowledge of Wilson's union activity and that, in contrast to this, the Respondent has proved substantial and legitimate business reasons and justification for Wilson's discharge.

The first issue presented by the conflicting contentions is whether the Respondent did have a mandatory call-in rule. Heretofore, I have alluded to Christie's testimony to the effect that when Wilson came back to the Respondent's facility to obtain a written reason for his discharge, Christie told Wilson that the Respondent had "more or less such a rule." In further testimony Christie expanded upon this alleged rule. He admitted that although the Company does not have printed rules as to what people can and cannot do, there "is a practice of the Respondent that any employee, whether he be a warehouseman or a salesman, that they call in at all times and let the Company know if they have a problem or if they can't be at work." Moreover, Christie

testified that this practice has been in effect since Christie has been manager of the facility, a period of some 14 years. Christie further testified that the rule was necessary in order to arrange the work load in the warehouse inasmuch as they had trucks going out. Because the trucks leave the warehouse anywhere from 6:30 to 7 in the morning, drivers must be available and people to load the trucks must be available. However, Christie testified further that with regard to instructions given the warehouse employees, Christie does not talk to these employees when they are hired. Villarreal hires them and if the instructions are given to the employees it is Villarreal who gives them.

In addition to the testimony of Christie, several of the witnesses called by the General Counsel testified with regard to the alleged work rule. Thus, employee Gonzalez under questioning by counsel for Respondent admitted that Villarreal had told him to call in when he was going to be absent. He further admitted that, in fact, Villarreal told him Villarreal would give him only one more chance when Gonzalez also failed to appear for work on March 27, the day Wilson failed to appear. However, in his case, when Gonzalez reminded Villarreal that some time before that Villarreal had been told by Gonzalez that the latter would be absent at some time because he had to move his home, Villarreal did not discharge Gonzalez.

Employee Sulvester Linzy, Jr., testified that he was absent 15 to 20 times during the period of time that he was employed and that if he did call in he would have

to speak to Louis or Louis' assistant. However, Linzy insisted that there was no announced company policy with regard to calling in and reporting absences until after the election. Nevertheless, on cross-examination Linzy finally admitted that even before the election upon a number of times when he was going to be absent he did have someone call in for him. He explained this by saying that he called in to keep Villarreal from getting angry. He admitted that Villarreal would become angry when Linzy did not call in when the latter was going to be absent. Additionally, even Wilson on cross-examination admitted that he had been warned three or four times about being absent without calling in. Since Wilson was discharged before the election, this testimony of Wilson would tend to destroy the testimony of Linzy to the effect that there was no announced policy of calling in until after the election.

Accordingly, and without relying on Villarreal's own testimony to the effect that there was such a rule, I find that, indeed, the rule existed. If Villarreal did not explain the rule to the employees immediately upon their being hired, I find and conclude that the employees, including Nathan Wilson, knew of such a rule and that it was enforced to some extent, at least. This conclusion is bolstered by the very fact that Nathan Wilson and his wife testified that on the morning of March 27, Mrs. Wilson called in to inform Villarreal of the fact that Wilson was ill and could not report to work that day.

The second issue presented by the opposing contentions is whether there was,

in fact, a telephone call placed by Mrs. Wilson to the Respondent's facility and, if such telephone call was made, whether Villarreal was apprised of the fact that Wilson could not attend work on March 27. Manager Christie testified on direct examination that no one could have received the call, if it was made, at 6:30 a.m. on the morning of March 27 because at that time no one was present in the office to receive the call. He further testified that the office help arrived much later. However, on cross-examination Christie was less certain of himself and admitted first that some time in April one of the girls started to arrive at 6:30 and then finally admitted that this early arrival practice could have begun some time in March. He further testified that the only line open before 8 a.m. is the so-called "no. 5 line," the long distance line, and that the local line was not answered before that time.

Additionally, Georgia Ann Sargent, a witness called by the Respondent, stated that she answers the telephone in the Respondent's office, and was working in the Respondent's office, where the telephone calls are received, on March 27, 1973. As a matter of fact, Sargent testified that she began coming in at 6:15 in the morning the week of March 27. Accordingly, she could have and would have received the telephone call allegedly made by Mrs. Wilson had such call been made. However, Sargent further testified that she never received any such call and that if she had she would have relayed it to Villarreal.

Thus the problem is presented as to

whether or not a call was related to Villarreal on the morning of March 27. According to Mrs. Wilson a call was made to the Respondent's premises and a lady answered the telephone. According to employee Sargent, she was the one who would have received the call but she received no such call that day. While it is possible to speculate that another female employee, one who was assigned at that time to the IBM room, could have received the call and forgotten to transfer it to Villarreal, I cannot indulge in such speculation. Moreover, Christie, whom I have heretofore credited, testified that the IBM operator possibly gets in by 7 a.m. Since she is the only other possible female employee getting in earlier than the rest of the office employees, and she does not get in until 7 a.m. at the earliest, I must conclude that although Mrs. Wilson might have placed a call to the Respondent's premises, the message never reached Villarreal. In conclusion, with regard to this issue, I carefully observed Sargent on the witness stand and from her demeanor was convinced that she was a truthful and reliable witness.

However, even assuming that Villarreal did not receive the message to the effect that Wilson was not going to report for work on March 27 because of illness, there is still the question of whether Wilson was discharged for union activity. From the testimony of a number of the employees it is apparent that although there may have been a practice or a rule requiring the employees to call in if they could not report to work, that nevertheless there were times when Villarreal

disregarded this rule. Thus, if an employee had a good excuse for being out on a previous day Villarreal would, at times, permit the employee to work the following day and not even reprimand the employee. Thus, employee Linzy credibly testified that only once when he came back after being absent and not calling in did Louis Villarreal speak to him about it. Villarreal told Linzy that he would have to do better or Villarreal would have to let Linzy go. However, at other times Villarreal did not reprimand Linzy for not calling in. But, there were times when Linzy reported in late and Villarreal sent him home as a disciplinary measure.

Also, employee Canales testified that there were times when he was absent without calling and after he returned to work and gave Villarreal an explanation of his absence, Villarreal accepted that explanation without reprimanding Canales. Villarreal himself indicated that there were times when, if an employee had a good reason for being absent the day before, Villarreal excused him for being absent even though the employee did not call in.

From all of this testimony it is concluded that although the rule did exist it operated completely at the discretion of Villarreal and whether an employee was chastised in any way or disciplined because of a failure to call in depended upon Villarreal's reaction to the employee's reason at the time it was given to Villarreal when the employee ultimately did return to work. Thus, although Villarreal may have warned Wilson on earlier occasions that the latter should

call in, there were other times when he apparently permitted Wilson to work even though Wilson had missed a day without calling in. On March 28, however, Villarreal did not give Wilson an opportunity to explain Wilson's illness the previous day, but discharged Wilson merely by saying that he had no more use for the latter. Thus, in a very real sense, whether or not Wilson's message that he could not report in because of illness on March 27 was conveyed to Villarreal becomes relatively unimportant in assessing the true reasons for Wilson's discharge. Before disposing of the issue of whether the discharge was for discriminatory reasons, however, the Respondent's contention that Villarreal had no knowledge of Wilson's union activity must be disposed of.

It has heretofore been found that Villarreal asked both Canales and Jimenez whether Nathan Wilson was involved and had started the union movement in the Respondent's shop. Accordingly, although Villarreal denied that he had knowledge of Wilson's union activity prior to the discharge, this denial is contradicted by the fact of the interrogations of Canales and Jimenez to the extent that Jimenez must have had some suspicion that Wilson was involved in organizing on behalf of the Union.

Additionally, Villarreal, on cross-examination, admitted that he had heard rumors that Wilson was in the Union and about the election and that the Union had offered the men certain benefits. He heard these things in the warehouse inasmuch as the employees did not follow the

rule that he had dictated to them about not talking about the Union during working hours. Finally, I have noted above that the Respondent's warehouse and truck driving employees constituted a unit of only about 14 individuals. This small group, confined as they were to the space of the warehouse, and whose members, by Villarreal's own admission, discussed union matters during working hours while being supervised by Villarreal, presents a sufficient basis to infer that Villarreal, especially in view of all of the other factors heretofore cited, had knowledge and knew of Wilson's participation in the union organizational drive at the time that Villarreal discharged Wilson. 10/ Accordingly, I find and conclude, that the Respondent's defense that Villarreal did not have any knowledge of Wilson's union activity until after Wilson was discharged is without merit.

There remains for resolution the issue of motivation; whether Villarreal discharged Wilson because the latter failed to call in regarding his absence of March 27 despite the warnings that Wilson had received on prior occasions when he failed to call in, or was absent without reason, or whether Villarreal discharged Wilson because the latter was a leader of the union movement in the Respondent's facility. On the one hand, the Respondent most certainly had in effect a practice or rule that a call-in was required in the event an employee had to be absent. On the other hand, the record equally establishes

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10/ See Weise Plow Welding Co., Inc., 123 NLRB 616.

the fact that Villarreal, himself, upon occasion, waived the application of this rule and, in some instances, did not even chastise in any way an employee for failing to call in to inform Villarreal of an absence. As heretofore found, therefore, the application of the rule by Villarreal as it applied to the employees under his supervision was one of complete discretion depending upon Villarreal's desire to apply it in a particular case.

Additionally, by the activity heretofore found to be violative of Section 8(a)(1) of the Act and of the employees' Section 7 rights, Villarreal demonstrated his strong opposition to and, to a certain extent, animus toward the Union and the union movement in the Respondent's warehouse. Some of this activity consisted of directly questioning other employees as to whether Wilson was the leader in the union movement. Therefore, because Villarreal had knowledge of Wilson's union activity, in the light of the almost complete control over the hiring and firing in the warehouse vested in Villarreal, together with his demonstrated opposition to the Union, the timing of Wilson's discharge becomes very significant. Although the record establishes that Wilson had been warned on a number of occasions with regard to his failure to call in and, moreover, a number of Wilson's fellow employees had also failed to call in and were warned for this infraction, the discharge of Wilson came at a time when the Union's preelection campaign was at its height. I conclude that this factor, in view of all of the other circumstances surrounding the discharge and preceding the discharge, preponderate in favor of a

finding that Villarreal seized upon Wilson's unexcused absence and failure to call in as a pretextual reason to discharge Wilson.

In coming to this conclusion I also note two other factors. They are the fact that Wilson had a legitimate reason for being absent on March 27 and was not given a chance by Villarreal to even explain his absence and the fact that Villarreal told Manager Christie that Wilson was a good worker when the latter was present. An additional factor, as mentioned above, is that Villarreal had listened to Wilson and other employees upon their return to work after a failure to call in and had permitted them to continue in the Respondent's employ upon the showing of a good reason for the absence. Accordingly, I find and conclude that on the record as a whole the General Counsel has established by a preponderance of the credible evidence, that Wilson was discriminatorily discharged by Villarreal because of Wilson's union activity and that such discharge was violative of Section 8(a)(3) and (1) of the Act.

I have not overlooked the testimony of Villarreal to the effect that in the 2 years preceding the hearing herein, Villarreal had discharged two other employees for failing to call in. However, on the basis of the unsubstantiated testimony of Villarreal in this respect and in view of the lack of credibility of Villarreal's other testimony herein, I do not find this testimony sufficient to warrant a refusal to make a finding of discriminatory discharge. 11/

11/ In assessing Villarreal's credibility or lack thereof, I note (continued)

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I,above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found, as set forth above, that the Respondent was engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action, as set forth below, designed to effectuate the policies of the Act.

It having been found that the Respondent, by unlawful interrogation, solicitation of employees for surveillance, promises of benefit, and other acts, has restrained and coerced employees in violation of Section 8(a)(1) of the Act, I shall recommend that the Respondent

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11/ (Continued) that much of Villarreal's testimony was given pursuant to leading questions by Respondent's counsel. Secondly, I have heretofore noted that Villarreal's testimony was contradictory in certain respects. Thirdly,I found Villarreal's testimony evasive, especially on cross-examination.

cease and desist therefrom.

Having found that the Respondent discriminatorily discharged Nathan A. Wilson, I shall recommend that Respondent offer Wilson immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges. In addition, I shall recommend that the Respondent make Wilson whole for any loss he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from the date of his discharge, less net earnings during said period. Backpay shall be computed with interest on a quarterly basis in the manner prescribed by the Board in F.W. Woolworth Company, 90 NLRB 289, 291-295; Isis Plumbing & Heating Co., 138 NLRB 716.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees with regard to their union activities and the union activities of their fellow employees, by soliciting employees to engage in acts of surveillance of other employees' union

activities, by making promises of benefit to induce employees to refrain from engaging in union activities, by soliciting an employee to falsely accuse the Union of threats of violence, and by other acts, the Respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed said employees in Section 7 of the Act and thereby Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily discharging its employee, Nathan A. Wilson, the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not engaged in other activities alleged in the complaint as violations of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(b) of the Act, I hereby issue the following recommended: 12/

12/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided (Continued)

ORDER

Respondent, Glazers Wholesale Drug Company, Inc., its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union sympathies and activities and the union sympathies and activities of other employees; soliciting employees to engage in surveillance of the protected concerted or union activities of other employees; making unlawful promises of benefit to employees for the purpose of inducing said employees to refrain from engaging in union activities and to repudiate the Union; threatening employees that the Union would engage in racial discrimination if the employees select the Union as their collective bargaining representative; soliciting employees to falsely accuse the Union of threats of violence, and threatening employees with loss of benefits in the form of vacations if the employees give assistance to or support the Union.

(b) Discouraging membership in Retail Clerks Union, Local No. 455, chartered by the Retail Clerks International Association, AFL-CIO, or any other labor organization, by discharging any employee

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12/ (Continued) in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

for engaging in union or other protected concerted activity, or discriminating against employees in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to form, join, assist, or be represented by Retail Clerks Union, Local No. 455, chartered by the Retail Clerks International Association, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activity for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any and all such activity.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Nathan A. Wilson immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him in the matter set forth in the section of this Decision entitled "the Remedy."

(b) Preserve, and upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records and reports and all other reports

necessary to analyze the amount of backpay due under this Order.

(c) Post at its facility in San Antonio, Texas, copies of the notice attached hereto marked "Appendix." 13/ Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint herein be dismissed insofar as it

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13/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

alleges violations of the Act not found herein.

Dated at Washington, D. C. DEC 13 1973

/s/ Morton D. Friedman
Morton D. Friedman
Administrative Law Judge

APPENDIX

FORM NLRB-4727 (9-69) JD-753-73

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

We hereby notify our employees that:

WE WILL NOT coercively question you concerning your union sympathies and activities or the union sympathies and activities of your fellow employees.

WE WILL NOT threaten your employment status by telling you that the Union will engage in racial discrimination.

WE WILL NOT ask any of you to inform us of the union activities, membership and desires of other employees nor will we ask you to spy upon your fellow employees for this purpose.

WE WILL NOT ask you about your attendance at union meetings.

WE WILL NOT unlawfully offer you wage increases or promise you other benefits

in order to induce you to refrain from engaging in union activities or in order to induce you to repudiate the Union.

WE WILL NOT ask you to falsely accuse the Union of threats of violence or other unlawful conduct.

WE WILL NOT threaten you with loss of vacation or any other benefits for giving assistance or support to the Union.

WE WILL NOT discourage membership in, or activities on behalf of Retail Clerks Union, Local No. 455, chartered by the Retail Clerks International Association, AFL-CIO, or any other labor organization of your choosing, by discriminating against any of you with regard to your hire or tenure of employment or any term or condition of employment.

WE WILL offer Nathan A. Wilson immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and we will make him whole for any losses he may have suffered as a result of our discrimination against him.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to form, join, or assist or be represented by the above-named Union, or any other labor organization, to bargain collectively through representatives of your own choosing or engage in other con-

certed activity for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activity.

GLAZERS WHOLESALE DRUG COMPANY, INC.
(Employer)

Dated ____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Dallas-Brazos Building, 1125 Brazos Street, Houston, Texas 77002. Telephone (713) 226-4296.

MJK
211 NLRB No. 155 D-8903
San Antonio, Tex.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GLAZERS WHOLESALE DRUG COMPANY, INC.

and Case 23--CA--4934

RETAIL CLERKS UNION, LOCAL NO. 455,

CHARTERED BY THE RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO

DECISION AND ORDER

On April 19, 1974, Administrative Law Judge George J. Bott issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his[1/] recommended Order, as modified herein.

1/ We agree with the General (Continued)

D--8903

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified

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1/ (Continued) Counsel's exceptions to the Administrative Law Judge's recommended Remedy and Order. Because of Respondent's unlawful withdrawal of recognition and refusal to bargain during the certification year, in order to insure that the employees will be accorded the statutorily prescribed services of their selected bargaining representative for the period provided by law, we hereby extend the initial year of certification, from the date on which Respondent commences good-faith bargaining to a date 4 months thereafter, Burnett Construction Company, 149 NLRB 1419, enfd. 350 F.2d 57 (C.A. 10, 1965).

We shall also modify the recommended Order to order Respondent to make whole the reinstated economic strikers by paying them the wage rate instituted by Respondent for the strike replacements, with interest.

herein, and hereby orders that Respondent, Glazers Wholesale Drug Company, Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following paragraphs in lieu of paragraph 2(a) of the recommended Order and reletter the succeeding paragraphs accordingly:

"(a) Upon request, bargain with the Union as the exclusive representative of employees in the appropriate unit and, if an understanding is reached, enbody it in a signed agreement. Regard the Union upon resumption of bargaining and for 4 months thereafter as if the initial year following certification had not expired.

"(b) Make whole the reinstated economic strikers by paying them the sum which they would have earned had they been

paid at the wage rates instituted for the strike replacements, with interest, in accordance with the formula set forth in F. W. Woolworth Company, 90 NLRB 289, and Isis Plumbing & Heating Co., 138 NLRB 716.

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order."

2. Substitute the attached notice for that of the notice attached to the Administrative Law Judge's Decision.

Dated, Washington, D.C. JUN 25 1974

Edward B. Miller, Chairman

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

D--8903

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT change wages or other terms or conditions of employment without bargaining with Retail Clerks Union, Local No. 455, chartered by the Retail Clerks International Association, AFL-CIO.

WE WILL NOT poll you at inappropriate times on the question of whether you want the Union to represent you.

WE WILL, upon request, bargain collectively with the Union as the bargaining representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody it in a signed agreement. WE WILL regard the Union upon resumption of bargaining and for 4 months thereafter as if the initial year following certification had not expired. The bargaining unit is:

> All full-time and part-time employees employed by us in Bexar County, Texas, but excluding all guards, watchmen, office clerical employees, salesmen, and supervisors as

> defined in the National Labor Relations Act.

WE WILL make whole those employees who were reinstated after their economic strike by paying them the amount they would have earned had they been paid at the same rates that we paid the strike replacements, with interest.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the National Labor Relations Act, as amended.

GLAZERS WHOLESALE DRUG COMPANY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.
Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Dallas-Brazos Building, 1125 Brazos Street, Houston, Texas 77002, Telephone 713--226--4296.

JD-250-74
San Antonio, Tex.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

GLAZERS WHOLESALE DRUG
COMPANY, INC.

and Case No. 23-CA-4934

RETAIL CLERKS UNION, LOCAL
NO. 455, chartered by the
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO

Jorge H. Torres, Esq., for
the General Counsel.
Emil Corenbleth, Esq.,
Dallas, Texas., for the
Respondent.
Mr. James Phillips, Houston,
Tex., for the Charging Party.

DECISION

Statement of the Case

GEORGE J. BOTT, Administrative Law Judge: Upon a charge of unfair labor practices filed on December 10, 1973, by Retail Clerks Union, Local No. 455, chartered by the Retail Clerks International Association, AFL-CIO, herein called the Union, against Glazers Wholesale Drug Company, Inc., herein called Respondent or Company, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on

January 25, 1974, which he amended on February 5, 1974, alleging that Respondent had violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer and a hearing was held before me at San Antonio, Texas, on March 5, 1974, at which all parties were represented. Subsequent to the hearing, General Counsel and Respondent filed briefs which have been considered.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's Business

Respondent is a Texas corporation with a place of business in San Antonio, Texas, where it is engaged in the wholesale liquor business. During the 12-month period prior to the issuance of the complaint, Respondent purchased goods and materials valued in excess of $50,000 which were shipped directly to it from points outside the State of Texas.

Respondent is an employer engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. Refusal to Bargain

1. The facts.

Having won a National Labor Relations Board election on April 5, 1973, the Union was certified by the Board on April 13, 1973, as the statutory representative of Respondent's drivers and warehousemen. 1/

On October 25, 1973, unable to reach final agreement after nine collective bargaining meetings, the Union engaged in a strike which lasted until on or about December 5. The strike was unsuccessful, and it appears that all of the strikers who desired reinstatement were returned to their jobs after the strike.

During the strike Respondent hired replacements for the strikers and paid them higher wages than some of the persons they replaced were earning prior to the strike. Union representative Phillips testified credibly and without contradiction that replacements were offered and paid a wage higher than Respondent had offered to pay employees represented by the Union during the first year of a proposed 3-year contract. It was also stipulated that this had occurred in a

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1/ The appropriate unit found by the Board was "all full-time and part-time employees employed by Respondent operating in Bexar County, Texas, but excluding all guards, watchmen, office clerical employees, salesmen, and supervisors as defined in the Act." Between 15 and 20 employees have been in the unit at material times.

"substantial" number of cases.

During a collective bargaining meeting held on November 8 during the strike, Union representative Phillips asked for and was refused the names and addresses of the replacements for the strikers, and on November 12, 1973, he confirmed his request in a letter.

On November 15, 1973, Respondent's counsel wrote Phillips noting that the strike was still current and advising that, "Your request, if valid, is premature, and the furnishing of such list at this time would subject our new employees to harassment, unpleasantness and the like." The writer also advised Phillips that when the strike is over and strikers apply for reinstatement, and if the "union represents a majority of employees," information about the "permanent replacements of strikers" would be available. 2/

The parties engaged in extensive correspondence during the strike, and, in a letter dated November 29, 1973, Respondent's counsel, after noting that the Union had requested another bargaining meeting to be held on December 7, 1973, stated that such would "take place, provided, of course, that the Union still represents a majority of the employees."

2/ Although Respondent considered setting up a preferential hiring list for strikers who had been replaced, all strikers were returned to their jobs, as noted earlier.

On December 5, 1973, Respondent polled employees in the unit on the question of whether or not they desired the Union "to NOW represent" them in collective bargaining. 3/ James Christe, Respondent's branch manager, testified that before the vote he read a prepared statement to the employees explaining the purpose of the poll. In the prepared statement, which is in evidence, Christe advised the employees that the Union claimed to represent the employees and had asked Respondent to bargain with it, but that he did not believe that the Union represented a majority of the employees. To determine that question, a "secret poll" would be conducted, he said, and he showed the employees a ballot box. He then read the ballot and noted that there were "Yes" and "No" boxes on it. Reading from the statement, he advised employees not to sign their ballots, adding that no one would know how they voted. He then appointed two "referees," or observers, advising the employees that they would be in charge of the ballot and, after the voting, would count the ballots and announce the results.

3/ Just prior to the poll. Respondent received a petition signed by seven employees stating that they did not wish to be represented by the Union. This petition was admitted into evidence not to prove the truth of the statement made therein but to corroborate Christe's testimony that he conducted the poll after he received the petition and consulted with his attorney about it.

Christe also advised the employees that there would be no reprisals against them regardless of how they voted in the election.

The employees and the observers retired to a "break-room," where the earlier Board election had been conducted, and voted after receiving ballots from the observers and having had their names checked off a voting list. At the conclusion of the election, the ballots were counted by the observers and the result announced. The employees voted 13 to 3 against the Union. 4/

Employee Homer Adams testified that the vote was not secret because all the employees were in the room where the election was conducted at the same time and were marking their ballots on the wall or one another's backs in view of each other. Adams did not otherwise contradict Christe's testimony.

Paul Williamson, one of the referees, testified that the balloting was secret, in his view, and that he did not see employees mark their ballots on other employees' backs.

Christe did not see the actual balloting, but I credit his basically uncontradicted testimony about what he told the employees before the voting. I find it unnecessary to decide, however, whether the mechanics of the election actually guaranteed the employees the secrecy that they would have had in a Board election,

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4/ Three employees did not vote.

since, as appears below, I conclude that Respondent had no legitimate purpose in conducting the poll. 5/

On December 6, 1973, Respondent's counsel sent a telegram to the Union stating that because the Union did not "now" represent a majority of Respondent's employees, he would not meet with the Union for further negotiations, as requested. Respondent concedes that it has refused and continues to refuse to recognize the Union as the bargaining representative of its employees.

2. Analysis and Conclusions

a. Withdrawal of recognition

In the absence of unusual circumstances, the majority status of a certified union is irrebuttably presumed for a reasonable period of time, normally 1 year. 6/ Respondent withdrew recognition from the Union on December 6, 1973, more than 4 months before the expiration of the certification year, and the violation of Section 8(a)(5) of the Act is clear unless Respondent can point to extraordinary or unusaul circumstances justifying

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5/ There was no voting booth, for example.

6/ Brooks v. N.L.R.B., 348 U.S.96 (1954). N.L.R.B. v. Little Rock Downtowner, 414 F. 2d 1084, 1090 (C.A. 8); Toltec Metal, Inc. v. N.L.R.B. (C.A. 3), decided January 25, 1974 (85 LRRM 1350); Celanese Corporation of America, 95 NLRB 664, 671-672.

justifying its conduct. I find none in the record.

In approving the Board's rule that a certification may not be challenged for 1 year from the date it issued, the Supreme Court in Brooks, supra, had before it a situation where the union won a Board election, but just prior to certification, 9 of the 13 employees in the unit signed a letter to the employer stating that they no longer wanted to be represented by the union. The Court reviewed the Board's practice in this area, both before and after the passage of the Taft-Hartley Act, noting, among other considerations, the Board's reliance on the custom in political and business spheres; the solemnity of the election; the need to give a union ample time to carry out its mandate without undue pressure to deliver or be turned out; and the fact that it is not conducive to employer bargaining in good faith if he knows, on the one hand, that stalling may undermine union strength, or, on the other, that rank and file may repudiate their agent "at the last moment." 7/ In the instant case, the employees expressed their dissatisfaction with their bargaining agent more formally and much later than they did in Brooks, and the parties had also bargained to an impasse after nine meetings. Nevertheless, the principles expressed in Brooks apply, for employee repudiation of their union by any means and at any time during the certification uear may not be relied on by their employer to excuse his refusal to continue

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7/ Brooks, supra at 99-100.

bargaining with the certified union, because to allow such reliance is not conducive to the underlying purpose of the Act, industrial peace and stability. 8/

The fact that Congress has prevented the Board from holding more than one election a year in any given unit is an indication that it, too, believed that the spacing of elections furthered industrial peace. Clearly it would run contrary to that policy to permit an employer to act as the surrogate of the Board and hold his own election during the certification year. 9/

8/ Id. at 103, I consider the facts in N.L.R.B. v. Alva Allen Industries, 369 F. 2d 310 (C.A. 8), cited by Respondent, distinguishable on a number of gounds, one of which was that recognition was withdrawn only 11 days before the expiration of the certification year. See also, N.L.R.B. v. Holly-General Company, Division of Siegler Corporation, 305 F. 2d 670 (C.A. 9); McLean v.N.L.R.B., 333 F. 2d 84 (C.A. 6); Kit Manufacturing Company, Inc., 138 NLRB 1290, 1294, enfd. 319 F. 2d 857 (C.A. 9).

9/ Section 9(c)(3) of the Act. Respondent can find no justification for the poll in the holding of the Board in Struksnes Construction Co., 195 NLRB 1062. In that case, the Board held that polling of employees by an employer would violate the Act unless certain standards are observed. The first safeguard the Board established was that the purpose of (Continued)

b. Other allegations of refusal to bargain

The complaint alleges that Respondent refused to bargain with the Union by employing replacements for strikers and offering and paying them higher wages than Respondent was paying or offering to pay its regular employees. It was stipulated that during the strike Respondent did pay a substantial number of replacements higher wages than it was paying the persons they replaced. Respondent's position was that it was required to do this in order to secure replacements for the strikers and keep its business running. Respondent's wage rates before the strike ranged from $1.76 to $2.00 an hour, and Respondent hired a number of replacements at $1.85 per hour or more, but it did not exceed $2.00. Respondent's offers and payments to replacements, therefore, were within the established wage rate range, but nevertheless, as stated, a substantial number of replacements

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9/ (Continued) the poll must be to determine the truth of a union's claim of majority, but the Union's claim of majority in this case rests on an irrebutable presumption of majority status flowing from its certification, and on nothing else. In short, since the Struksnes safeguards were not designed for the kind of situation we have in this case, Respondent's poll served no valid purpose. See Kay Corporation, d/b/a Holiday Inn Chicago-South, Harvey, 209 NLRB No. 7, page 2, slip opinion.

were paid as much as 9 cents an hour more than the persons they replaced.

Respondent did not notify or consult with the Union in regard to the wage rates it paid replacements. On November 8, during the strike, Respondent offered the Union a 4-cent an hour across-the-board increase in the first year of a 3 year contract, and additional increases in the last 2 years. Even with a 4-cent increase, employees on strike would not be paid as much as their replacements. When Union representative Phillips asked Respondent's counsel why Respondent paid replacements more than had been paid or offered to the strikers, he was told that the practice was necessary in order to "get people to cross the picket line."

Assuming, as Respondent told the Union, that it was "necessary" to pay replacements a higher wage than regular employees had received or had been offered in collective bargaining before the strike in order to get them to accept employment, I find that such recruiting problems did not arise to the level of economic necessity excusing Respondent from notifying and consulting with the employees' bargaining representative about its intentions before it took action. By unilaterally and without notice to the Union substantially changing conditions of employment, Respondent violated Section 8(a)(5) and (1) of the Act. 10/

10/ See St. Clair Lime Company, 133 NLRB 1301; Mitchell Concrete Products Co., Inc., 137 NLRB 504, 505, 515; Tom Joyce Floors, Inc., (Continued)

I also find, as allged in the complaint, that Respondent violated Section 8(a)(5) and (1) of the Act by polling its employees during the certification year on the question of whether or not they desired to be represented by the Union. There was no legal justification for the poll during the certification year and it was wholly inconsistent with Respondent's obligation to recognize the Union as the employees' statutory representative, even if there had been a shift in employee sentiment since the certification.

In the circumstances of this case I find no violation of Respondent's duty to bargain in its failure to supply the Union with the names and addresses of the personnel it had employed as replacements for the striking employees. Although the Act imposes upon an employer the duty of furnishing a union data in its possession which is relevant and necessary to the performance of the bargaining agents' statutory responsibilities, where the information sought, as here, bear on matters other than wages and related data, it is incumbent on the union to demonstrate the relevance of the information it requests. This the Union did not do. Moreover, Respondent's refusal to comply was not final, for it indicated in its letter to the Union that the request

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10/ (Continued) 353 F.2d 768 (C.A. 9). In Pacific Gamble Robinson Co. v. N.L.R.B., 186 F.2d 106 (C.A. 6), relied on by Respondent, the Court thought that the increases offered the replacements were not "substantially" greater than that offered the union.

would be reconsidered at the end of the strike, and, when the strike concluded, Respondent returned all strikers to work whether they had been replaced or not. Even if the Union's request, when made, did appear to relate to data it might need at some time in the bargaining process, the issue became moot when the strikers returned to their jobs. Respondent did not violate Section 8(a)(5) and (1) of the Act in this regard, as the complaint alleged. 11/

IV. The Remedy

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, it will be recommended that the Board issue the recommended Order set forth below requiring Respondent to cease and desist from said unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

11/ Little Rock Downtowner, Inc., 145 NLRB 1286, 1308.

3. By withdrawing recognition from the Union as the representative of unit employees at its San Antonio, Texas, operation violated Section 8(a)(5) and (1) of the Act.

4. By unilaterally and without notice to, or consultation with the Union, changing terms and conditions of employment of unit employees, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By conducting a poll of its employees during the certification year on the question of union representation, Respondent violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

Upon the foregoing findings of fact, conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I recommend the following: 12/

ORDER

Respondent, its officers, agents, successors and assigns, shall:

12/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board (Continued)

1. Cease and desist from:

(a) Refusing to recognize and bargain with the Union as the exclusive representative of employees in the unit found appropriate.

(b) Unilaterally and without prior notice to, or consultation with the Union, changing terms and conditions of employment of unit employees.

(c) Polling employees at inappropriate times on the question of whether or not they want the Union to represent them.

(d) In any other like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive representative of employees in the appropriate unit, and, if an understanding is reached, embody it in a signed agreement.

(b) Post at its San Antonio, Texas, facility, copies of the attached

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12/ (Continued) and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for abl purposes.

notice marked "Appendix." 13/ Copies of said notice, on forms provided by the Regional Director for Region 23, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof in conspicuous places, including all places where notice to employees are customarily posted, and be maintained by it for 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C. APR 19 1974

/s/ George J.Bott
George J. Bott
Administrative Law Judge

13/ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

FORM NLRB-4727 APPENDIX JD-250-74

NOTICE TO
EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT change wages or other terms or conditions of employment without bargaining with RETAIL CLERKS UNION, LOCAL NO. 455, chartered by the RETAIL CLERK INTERNATIONAL ASSOCIATION, AFL-CIO.

WE WILL NOT poll you at inappropriate times on the question of whether you want the Union to represent you.

WE WILL, upon request, bargain collectively with the Union as the bargaining representative of all employees in the bargaining unit described below with respect to wages, hours and other terms and conditions of employment, and, if an understanding is reached, embody it in a signed agreement.

The bargaining unit is:

> All full-time and part-time employees employed by us in Bexar County, Texas, but excluding all guards, watchmen, office clerical employees, salesmen, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you in Section 7 of the National Labor Relations Act, as amended.

GLAZERS WHOLESALE DRUG COMPANY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Dallas-Brazos Building, 1125 Brazos Street, Houston, Texas 77002
(Tel. No. 713 - 226-4271).

No. 75-1147

In the Supreme Court of the United States

OCTOBER TERM, 1975

GLAZERS WHOLESALE DRUG CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The Board's decisions and orders (Pet. App. 20-26, 70-76) are reported at 209 NLRB 1152 and 211 NLRB 1063.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 18-19) was entered on November 28, 1975. A petition for rehearing (Pet. App. 19-20) was denied on December 31, 1975. The petition for a writ of certiorari was filed on February 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the facts of this case, the Board properly required the employer to bargain with the union for the entire certification year.

[1]The cases were consolidated in the court of appeals.

2. Whether the Board properly found that the employer violated its bargaining obligation by failing to notify and consult with the union before hiring permanent replacements at wages higher than it had previously offered its striking employees.

3. Whether the Board properly required the employer to reimburse the strikers whom it reinstated for what they would have earned had they been paid at the wage rates unilaterally extended to the replacements.

4. Whether substantial evidence supports the Board's finding that the employer discharged employee Wilson for engaging in union activity.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. *Background*

Petitioner is in the wholesale liquor business in San Antonio, Texas (Pet. App. 29-30). In February 1973 the

Union[2] began an organizing campaign among the drivers and warehousemen at petitioner's San Antonio warehouse (Pet. App. 31). On April 5, 1973, the Union unanimously won a Board-conducted election, and on April 13 the Board certified the Union as the bargaining representative of the drivers and warehousemen (Pet. App. 31, 79).

2. *The discharge of Nathan A. Wilson*

Employee Nathan A. Wilson was conspicuously active in the Union's campaign. He spoke about the Union to every employee in the unit[3] and obtained five or six authorization cards (Pet. App. 49-50). Warehouse manager Louis Villarreal, Wilson's immediate supervisor, worked in constant contact with the employees. He was strongly opposed to the Union and had made threats and promises of benefit to other employees. The Board found that these threats and promises violated Section 8(a)(1) of the Act (Pet. App. 40-44). Villarreal admittedly heard rumors of Wilson's union activity, and he coercively interrogated two employees about it (Pet. App. 40-41, 58-59).[4]

Petitioner has a rule requiring employees to report expected absences in advance (Pet. App. 54). On March 27, 1973, Wilson was ill and did not report for work (Pet. App. 50). Mrs. Wilson testified that she called in for her husband at 6:30 a.m. that morning, but the message never reached Villarreal (Pet. App. 50, 56). When Wilson reported at the normal time on March 28 Villarreal told him that he had been discharged (Pet. App. 50).

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[2]Retail Clerks Union, Local No. 455.

[3]The unit contained 15 to 20 employees (Pet. App. 79, n. 1).

[4]The Board found that this interrogation violated Section 8(a)(1) of the Act (Pet. App. 40-43). The Board's Section 8(a)(1) findings respecting Villarreal were sustained by the court of appeals and are not at issue here.

Later that day Wilson returned to the warehouse and asked the branch manager, James Christie, why he had been discharged. Christie in turn questioned Villarreal, who told him that Wilson had not called in his absence on March 27 and on previous occasions. Villarreal also said that Wilson was otherwise a good worker (Pet. App. 51). Christie said he would support Villarreal's decision. He then gave Wilson a statement, written by Villarreal, which stated that Wilson had been warned on three or four previous occasions when he had failed to call in absences or latenesses (Pet. App. 50).

The Board found that the call-in rule was enforced entirely at Villarreal's discretion, and that he waived it when in his opinion an employee had a good excuse for his absence (Pet. App. 57-58). On March 28 Villarreal did not give Wilson a chance to explain the previous day's absence, but discharged him on arrival at the warehouse, saying that he had no further use for him (Pet. App. 50, 58).

3. *The unilateral change in wages*

After failing to reach an agreement with petitioner, the Union struck from October 25, 1973, until approximately December 5, 1973 (Pet. App. 79). At the conclusion of the strike, which was unsuccessful, all of the strikers who desired reinstatement apparently received it (*ibid.*).

During the strike petitioner continued operations with replacements. A substantial number of the replacements were paid as much as nine cents an hour more than the employees they replaced and as much as five cents an hour more than the highest proposal petitioner had made to the Union during collective bargaining (Pet. App. 87). Petitioner did not notify or consult with the Union about the wages paid to the replacements (*ibid.*).

4. *The poll and withdrawal of recognition*

On November 29, 1973, in response to a request by the Union for a bargaining session on December 7, petitioner

stated that it would agree—"provided, of course, that the Union still represents a majority of the employees" (Pet. App. 80).

On December 5, 1973, petitioner polled the employees in the unit, including the replacements, on the question whether they wished the Union " 'to NOW represent' them in collective bargaining" (Pet. App. 81). Paper ballots and a ballot box were used. Petitioner's branch manager informed the employees that the poll would be secret and that no reprisals would be taken regardless of how they voted (Pet. App. 81-82). The employees voted 13 to 3 against the Union; three employees abstained (Pet. App. 82).

On December 6, 1973, petitioner's counsel informed the Union by telegram that, because the Union did not "now" represent a majority of the unit employees, he would not meet with the Union for further negotiations. Petitioner has continued to refuse to recognize the Union as the bargaining agent for its employees (Pet. App. 83).

B. THE BOARD'S DECISIONS AND ORDERS

The Board held that the reasons given by petitioner for Wilson's discharge were pretextual and that the discharge was in fact motivated by Wilson's union activity, in violation of Section 8(a)(3) and (1) of the Act (Pet. App. 21, 61). The Board ordered petitioner to cease and desist from discriminating against employees on the grounds of their union activity and to reinstate and make whole Nathan Wilson (Pet. App. 66).

In a separate decision the Board held that petitioner had violated Section 8(a)(5) of the Act by polling its employees about their union sympathies and then withdrawing recognition from the Union four months before the end of the certification year (Pet. App. 83-84, 88). The Board also held that petitioner had unilaterally changed its wage structure in violation of Section 8(a)(5) of the Act by paying

replacements for strikers five cents an hour more than the increased wage it had offered to the Union (Pet. App. 86-87). The Board ordered petitioner to recognize and bargain collectively with the Union for a period of four months from the date on which it commences bargaining in good faith. The Board further ordered petitioner to make the reinstated strikers whole by paying them at the wage rate instituted for the replacements (Pet. App. 71-73).

C. THE COURT OF APPEALS' DECISION

The court of appeals summarily enforced the Board's orders (Pet. App. 18-19).

ARGUMENT

1. In *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, this Court approved the Board's rule that, absent unusual circumstances, an employer is obliged to bargain with a union certified after an election for a reasonable period, normally one year, even if the union no longer represents a majority of the employees. Petitioner contends (Pet. 9-11) that this rule has been "arbitrarily and capriciously" applied to it since its poll, taken four months before the end of the certification year, "objectively" demonstrated loss of majority by the Union.

Petitioner misconceives the basis of the *Brooks* principle. In *Brooks*, as here, the employer had established that a majority of its employees no longer supported the union. 348 U.S. at 97. But there, as here, the employees' repudiation had come within one year of a valid election, during which Section 9(c)(3) of the Act, 29 U.S.C. 159(c)(3), forbids another election. In these circumstances, the Court held, the Board's requirement that the employer bargain for one year furthered the congressional interest in industrial stability and thus was well within the Board's discretion. 348 U.S. at 103-104.

In short, *Brooks* did not turn on the source or certainty of the employer's knowledge of employee defections from

the union. It turned on the Act's policy that an established union-employer relationship should be given an adequate opportunity to function. 348 U.S. at 103.

Since no collective bargaining relationship exists when a union demands recognition for the first time and has not been certified, the asserted decline and fall of the "good faith doubt" standard in that situation[5] has no relevance to this case. Indeed, in *Brooks* this Court rejected any analogy between informal recognition and withdrawal of recognition as an attempt "to make situations that are different appear the same." 348 U.S. at 104. For a similar reason decisions related to the source of an employer's knowledge of employee defections from the union after the certification year has ended are inapposite. *Wanda Petroleum Co.*, 217 NLRB No. 62 (1975).

This case does not conflict with *National Labor Relations Board* v. *Alva Allen Industries, Inc.*, 369 F.2d 310 (C.A. 8). In *Alva Allen* the Board found that with 11 days remaining in the certification year the union had abandoned its efforts to represent the employees. This behavior, the Eighth Circuit held, constituted an "unusual circumstance" which justified a subsequent refusal to bargain by the employer. See also *Brooks, supra*, 348 U.S. at 98. No abandonment by the union or other comparable circumstance is present here.

2. The second issue raised by petitioner (Pet. 4, 11-14)—whether petitioner had the right, without consulting the Union, to hire replacements and pay whatever was required to continue operations—is not presented by this record. The Board accepted *arguendo* petitioner's contention that it was economically necessary to pay a higher rate in order to induce replacements to cross the picket line (Pet.

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[5]See *Linden Lumber Division* v. *National Labor Relations Board*, 419 U.S. 301, 304-305; *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 590-595.

App. 87). However, it does not follow from that premise that petitioner was relieved of its obligation to notify and consult with the employees' bargaining representative before hiring permanent replacements at the higher rate. As this Court has stated, "even after an impasse is reached [an employer] has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement." *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 745.[6] See also *National Labor Relations Board* v. *Tom Joyce Floors, Inc.*, 353 F.2d 768, 771-772 (C.A. 9).

3. The portion of the Board's order that requires petitioner to make reinstated economic strikers whole by giving them the benefit of the rate paid the replacements is within the Board's remedial powers. The Board has broad discretion to formulate affirmative relief in order to effectuate the policies of the Act. See, *e.g.*, *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 215-216; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-347. The Board's order in this case takes the familiar form of requiring the employer to eradicate the effects of unilateral changes in wages that differentiate between strikers and non-strikers. See, *e.g.*, *Sinclair Glass Co.* v. *National Labor Relations Board*, 465 F.2d 209, 210-211 (C.A. 7); *National Labor Relations Board* v. *Aero-Motive Manufacturing Co.*, 475 F.2d 27, 28 (C.A. 6).

Contrary to petitioner's contention (Pet. 14-15), this decision does not conflict with *Culinary Alliance & Bartenders Union Local 703* v. *National Labor Relations Board*,

[6] In *Pacific Gamble Robinson Co.* v. *National Labor Relations Board*, 186 F.2d 106 (C.A. 6), upon which petitioner relies (Pet. 12), the employer paid strike replacements no more than the permanent rate which had been offered to the union and rejected. *Id.* at 109-110.

488 F.2d 664 (C.A. 9), and *Int'l Union of Electrical, Radio & Machine Workers* v. *National Labor Relations Board (Tiidee Products, Inc.)*, 426 F.2d 1243 (C.A. D.C.). *Tiidee Products* held that, where the employer had refused recognition in flagrant bad faith, the Board has the statutory power to award some make-whole relief that would prevent the employer from "having a free ride during the period of litigation." 426 F.2d at 1251. This relief, the court of appeals stated, might include wages and benefits "it is likely the parties *would* have agreed to." *Id.* at 1252; emphasis in original.[7] In *Culinary Alliance* the Ninth Circuit held only that the facts of the case did not show sufficient bad faith by the employer to raise the issue whether the court should require the make-whole relief suggested in *Tiidee Products*. 488 F.2d at 666. The order in this case, on the contrary, does not compel petitioner to pay a wage rate it "would" have paid but never actually did pay. Petitioner already had extended the wage rates in question to a portion of its employees, and the Board's order simply requires it to undo the effect of its unilateral change in the manner least harmful to the entire work force.

4. The final question presented (Pet. 4, 15-17)—whether the General Counsel sustained his burden of proof that Wilson's discharge was discriminatorily motivated—raises only an evidentiary question which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the evidence summarized at pages 3-4, *supra*, supports the Board's findings.

[7] On remand the Board found that it was impossible to determine whether the parties would have agreed to any particular terms at any given time. *Tiidee Products, Inc.*, 194 NLRB 1234, 1235, enforced as modified, 502 F.2d 349 (C.A. D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1976.

DOJ-1976-03